Supreme Court, U.S.
FILED

961537 MAR 27 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

TOM SWINT, et al.,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

E. EARLE BURKE
THE LAW OFFICES OF
E. EARLE BURKE
1720 Peachtree Street, NW
Suite 470, South Tower
Atlanta, Georgia 30309
(404) 892-1210

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

47 pp

QUESTIONS PRESENTED

I. Whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. Section 1983.

II. Whether the decision below by the 11th Circuit Court of Appeals denying Defendant's First Motion for Summary Judgment is the law of the case.

PARTIES

The parties in the Court below are as follows:

Plaintiffs-Appellants: Tom Swint, Tony Spradley, Drecilla James, and Jerome Lewis.

Defendants-Appellees: Chambers County Commission and James C. Morgan.

The Plaintiffs-Appellants are petitioners in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THIS CASE PRESENTS THE SAME QUESTION UPON WHICH THIS COURT GRANTED CERTIORARI IN McMIILLIAN V. MONROE COUNTY, NO. 96-542	5
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN PEMBAUR V. CINCINNATI	6
III. BY GRANTING SUMMARY JUDGMENT FOR SHERIFF MORGAN CLAIM AFTER RULING THAT SHERIFF MORGAN SHOULD GO TO TRIAL, THE ELEVENTH CIRCUIT COURT OF APPEALS CONTRAVENED THE DOCTRINE OF THE LAW OF THE CASE	8
IV. THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW AND AFFECTS THE EFFICIENCY OF THE JUDICIAL PROCESS	12
CONCLUSION	13

TABLE OF CONTENTS – Continued

Page

APPENDIX

Appendix A – Opinion of the United States Court of Appeals for the Eleventh Circuit Dated December 27, 1996 .....App. 1

Appendix B – Memorandum Order of the United States District Court for the Middle District of Alabama Northern Division.....App. 8

TABLE OF CITATIONS

Page

CASES CITED:

Arizona v. California, 460 U.S. 605 (1983) 11

Hardin v. Hayes, 957 F.2d 845 (11th Cir. 1992) 8

Litman v. Massachusetts Mutual Life Insurance Co., 825 F.2d 1506 (11th Cir. 1987) 9

McMillian v. Johnson, 88 F.3d 1573 (11th Cir. 1996) 4

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 6

Montana v. United States, 440 U.S. 147 (1979) 11

North Mississippi Communications, Inc. v. Jones, 951 F.2d 652 (5th Cir. 1992) 10

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 6

Pembaur v. Cincinnati, 746 F.2d 337 (6th Cir. 1984) 7

Swint v. City of Wadley, 11 F.3d 1030 (11th Cir. 1994) (*Swint II*) 2, 9, 11, 12

Swint v. City of Wadley, 51 F.3d 988 (11th Cir. 1995) 3

Swint v. City of Wadley, Ala., 5 F.3d 1435 (11th Cir. 1993) (*Swint I*) 2, 8

United States v. Tamaro, 80 F.3d 1514 (1996) 9

Wheeler v. City of Pleasant Grove, 746 F.2d 1437 (11th Cir. 1984) 9

STATUTES CITED:

42 U.S.C. Section 1983 ..... 1, 6

Ala. Code Section 11-1-11 2

Ala. Code Section 11-2-30 2

TABLE OF CITATIONS – Continued

Page

Ala. Code Section 36-22-2 2

Ala. Code Section 36-22-3 ..... 2, 7

Ala. Code Section 36-22-5 ..... 2, 7

Ala. Code Section 36-22-6 2

Ala. Code Section 36-22-13 2

Ala. Code Section 36-22-16 ..... 2, 7

Ala. Code Section 36-22-17 2

Ala. Code Section 36-22-18 ..... 2, 7

Ala. Code Section 36-22-19 2

Ala. Code Section 36-22-42 2

Ala. Const. Art. V Section 138 ..... 1, 7

OTHER AUTHORITIES CITED:

10A Wright & Miller, *Federal Practice and Procedure*, § 2735 10

PETITION FOR WRIT OF CERTIORARI

The Petitioners, who are citizens of Alabama and Georgia and Plaintiffs in the District Court, request that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit to review that court's decision holding that sheriffs in Alabama are not final county policymakers in matters of law enforcement for purposes of county liability under 42 U.S. Section 1983.

OPINIONS BELOW

The December 27, 1996 opinion of the Eleventh Circuit is unreported.

No. 96-6229 (11th Cir. 1997), and is reproduced in the appendix to this petition, p. App. 1. The January 29, 1996 decisions of the United States District Court for the Middle District of Alabama is unreported and reproduced in the appendix, p. App. 8.

JURISDICTION

The opinion of the Eleventh Circuit was issued on December 27, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The federal statute involved is 42 U.S.C. Section 1983. Article V, Section 138 of the Alabama Constitution is

relevant, as are various provisions of the Alabama code, including Sections 36-22-2, 36-22-3, 36-22-5, 36-22-6, 36-22-13, 36-22-16, 36-22-17, 36-22-18, 36-22-19, 36-22-42, 11-1-11, and 11-2-30.

STATEMENT OF THE CASE

This police misconduct case was filed against governmental bodies and law enforcement officials from Chambers County, Alabama, and the City of Wadley, Alabama. After the District Court issued orders granting in part and denying in part various motions to dismiss, the Defendants appealed. The Eleventh Circuit Court of Appeals affirmed the denial of summary judgment with respect to the Fourth Amendment and equal protection claims against Defendant Sheriff James C. Morgan. The Court granted summary judgment to the Chambers County Commission on the ground that sheriffs in Alabama are not final county policymakers in the area of law enforcement. *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993). On Sheriff Morgan's request for rehearing, the Court reconsidered and reversed the denial of summary judgment on the equal protection claim, but continued to hold that Sheriff Morgan is required to stand trial on the Fourth Amendment claim. *Swint v. City of Wadley*, 11 F.3d 1030 (11th Cir. 1994).

At the Plaintiff's request, the United States Supreme Court granted certiorari on the county liability issue and the case was argued. The Court vacated the Court of Appeals decision on that particular question, holding that

the Court of Appeals did not have jurisdiction to entertain an interlocutory appeal from the County without certification. *Swint v. Chambers County Commission,* 115 S.Ct. 1203 (1995).

On remand, the Court of Appeals conformed its opinion to the Supreme Court's decision and remanded to the District Court for further proceedings. *Swint v. City of Wadley,* 51 F.3d 988, 999 (11th Cir. 1995). Upon remand to the District Court, a settlement was reached with a number of Defendants and the only two Defendants remaining were Sheriff Morgan and the Chambers County Commission.

The District Court ordered the parties to file statements regarding the issues remaining in the case. On or about October 30, 1995, the Defendants Chambers County Commission and Sheriff Morgan filed a joint "Response And Objection To Plaintiffs' Statement Regarding Pending Claims." In that document, Chambers County stated that it "respectfully requests the opportunity to resubmit a Motion for Summary Judgment for Chambers County based on the reasoning in *Swint v. City of Wadley* and the Eleventh Circuit's recent affirmance, in an unpublished opinion, of an Alabama District Court's holding that deputy sheriffs are not policymakers for Jefferson County. . . ." The County also contended in that joint response that an intervening Supreme Court decision required dismissal of the substantive due process claim against the County. However, nowhere in the response did Sheriff Morgan contend that intervening events or case law require the District Court to reverse itself – or the reverse the Eleventh Circuit – on whether the Fourth Amendment case against him should go to trial.

After the County requested the opportunity to file a summary judgment motion, the District Court issued a November 1, 1995, order permitting the filing of summary judgment motions by December 1, 1995. The County did file such a motion. However, Sheriff Morgan also filed his own summary judgment motion despite his concession that the Court already held that there was sufficient evidence against him to require a trial. With the motion, Sheriff Morgan attached three items: (1) a new affidavit from him, signed December 1, 1995, (2) a June 15, 1992 affidavit from Investigator Timothy Birchfield that already had been presented in conjunction with the first summary judgment motion, and (3) one page from the deposition of Plaintiff Dercilla James. None of this contained new evidence.

The District Court granted Sheriff Morgan's renewed summary judgment motion. It did so on the basis of statements in Morgan's new affidavit to the effect that it was not his policy that non-suspects could be searched or that business premises could be searched absent probable cause, and that he had not been told about improper practices at the first raid before the second one occurred. It also granted the motion for summary judgment of the Chambers County Commission, holding that counties in Alabama are not liable for the actions of their sheriffs in the area of law enforcement.

On appeal, the Eleventh Circuit agreed and affirmed, holding that summary judgments should be granted in the County Commission's favor. In its December 27, 1996 opinion, the Eleventh Circuit citing *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), noted that, under Alabama law, a sheriff is not a final policymaker in the area of law

enforcement. Pet. App. 4. The court also pointed out that because Morgan is an Alabama Sheriff and because the raids of Club Capri were law enforcement activities, Chambers County is not liable for any of Morgan's acts or decisions arising out of the raids.

In affirming the grant of Morgan's second motion for summary judgment, the Eleventh Circuit noted that the District Court grant of Morgan's Motion for Summary Judgment was appropriate because Morgan's affidavit was new and substantially different evidence within the first exception of the law of the case doctrine. Pet. App. 6. This petition follows. It seeks review of the Eleventh Circuit's decision regarding county liability and the liability of Sheriff Morgan.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE SAME QUESTION UPON WHICH THIS COURT GRANTED CERTIORARI IN McMILLIAN V. MONROE COUNTY, NO. 96-542.

On March 18, 1997, certiorari was granted in *McMillian v. Monroe County*, No. 96-542. Oral Argument was held on March 18, 1997. The issue presently before the Court in *McMillian* whether the sheriff of a county is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. Section 1983. If the Court reverses the Eleventh Circuit in *McMillian*, it also must reverse the present case on the issue of County liability.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN PEMBAUR V. CINCINNATI.

In *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court held that local governmental liability can be imposed under Section 1983 for the single action of a local governmental policymaker, if that person has final policymaking authority such that his or her "acts or edict may fairly be said to represent official policy." 475 U.S. at 480, quoting, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). *Pembaur* involved a suit against several Defendants, including a County in Ohio, because of an unconstitutional entry and search of the Plaintiff's business. One of the alleged grounds for County liability was that the sheriff's unconstitutional actions were those of a final county policymaker. Justice Brennan's opinion in *Pembaur* made it clear that "decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to [local governmental] liability." 475 U.S. at 483, n. 12 (emphasis in original). *Pembaur*, this Court affirmed the conclusion of the Sixth Circuit Court of Appeals that the sheriff in that case could act as a final county policymaker with respect to law enforcement. 475 U.S. at 484.

The portion of the Sixth Circuit's opinion on the matter – explicitly affirmed in this respect by this Court – stated that, under Ohio law, the sheriff is elected by the resident of the County, serves as chief law enforcement officer of the County, receives his office, book, furniture, and other materials from the County, and receives his salary and training expenses from the county. Because of these factors, the Sixth Circuit held that the sheriff is the

final policymaker for the County with respect to the law enforcement activities at issue, *Pembaur v. Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984), and this Court affirmed on that point. 475 U.S. at 484.

Similarly, under Alabama law, the sheriff is elected by the residents of the County, serves as chief law enforcement officer for the County, receives his office, books, furniture, and other materials from the County, and receives his salary and expenses from the County. Ala. Const. Art. V, § 138; Ala. Code §§ 36-22-3, 36-22-5, 36-22-16, 36-22-18. There is nothing of relevance to distinguish the Alabama sheriff from the Ohio sheriff in *Pembaur*.

> While the Eleventh Circuit in the present case noted that sheriffs are considered state officials under Alabama law, the Eleventh Circuit also made it clear that this point was not dispositive. Instead, the Eleventh Circuit based its ruling on the fact that Alabama counties have no law enforcement authority independent of the sheriff. Pet. App 4. Neither this Court's opinion, nor the Sixth Circuit's opinion in *Pembaur* pointed to any independent law enforcement authority of Ohio counties or suggested the issue was relevant. It is not as if county governing boards in Ohio directly supervise the law enforcement activities of their sheriffs or ride around with the sheriffs in the patrol cars.

Therefore, on the relevant factors, there is little to distinguish Alabama from Ohio, and the decision below conflicts with this Court's decision in *Pembaur*.

III. BY GRANTING SUMMARY JUDGMENT FOR SHERIFF MORGAN AFTER RULING THAT SHERIFF MORGAN SHOULD GO TO TRIAL, THE ELEVENTH CIRCUIT COURT OF APPEALS CONTRAVENED THE DOCTRINE OF THE LAW OF THE CASE.

In *Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993) (*Swint I*) the Court of Appeals affirmed the Trial Court's decision denying Defendant Sheriff Morgan's motion for summary judgment. Because of its obvious relevance, that discussion is quoted at length:

> [T]here were two raids in this case during which allegedly unconstitutional conduct occurred. Sheriff Morgan bases his claim to qualified immunity on his lack of personal involvement in and his lack of knowledge as to the details regarding the conduct of both raids. Citing this Court's opinion in *Hardin v. Hayes*, 957 F.2d 845 (11th Cir. 1992), Sheriff Morgan urges us to focus on the information he possessed at the time he authorized the raids. We do so, but cannot ignore the stark factual distinction between *Hardin* and the present case. In *Hardin* there was one suicide; in this case there were two raids. Indeed, at oral argument, Sheriff Moran's counsel conceded that after the first raid, Sheriff Morgan was debriefed on how the raid had been conducted. Counsel further acknowledged that what happened at the second raid was materially identical to the events of the first raid. Thus, even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months

> later in March of 1991, when he had reason to know better. Similarly, even if Chief Morgan and Officer Dendinger had not been fully aware of the Task Force's plan of attack before the first raid, as participants in the first raid they had ample opportunity to determine before the second raid was conducted whether the first had comported with constitutional requirements. Upon learning of the manner in which the first raid was conducted, reasonable law enforcement officials would have been on notice that clearly established Fourth Amendment rights had been violated. Willingness to engage in the second raid demonstrated deliberate indifference to those rights, and it reflected accession to and adoption of the policies and procedures employed.

5 F.3d 1448-1449. In *Swint v. City of Wadley*, 11 F.3d 1030 (11th Cir. 1994) (*Swint II*), the Court continued to hold that Sheriff Morgan is required to stand trial.

Under the law of the case doctrine, both the District Court and the Appellate Court are generally bound by a prior appellate decision of the same case. *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984). The doctrine promotes finality, assures the obedience of the District Court to appellate decisions, and avoids waste of judicial resources. The doctrine, is subject to exceptions and "does not apply to bar reconsideration of an issue when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Wheeler*, 746 F.2d at 1440, *See also, e.g., United States v. Tamaro*, 80 F.3d 1514, 1520 (1996); *Litman v.*

Massachusetts Mutual Life Insurance Co., 825 F.2d 1506, 1510 (11th Cir. 1987); see also *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992). *See also*, 10A Wright & Miller, *Federal Practice and Procedure*, § 2735 ("The denial of a motion for summary judgment . . . should . . . establish the law of the case for a subsequent motion based precisely on the same grounds.")

Here, there was no "substantially different" evidence presented on remand. According to Sheriff Morgan's memorandum in support of his summary judgment motion on remand, this Court's earlier rejection of his position was "[b]ased on the record as it stood at the time of oral argument before the Eleventh Circuit." Pet. App. 6. In this new affidavit, Sheriff Morgan claimed he was told only about the results of the raid and not the specific details. Pet. App. 20.

Prior to that, the time the Court of Appeals found that Sheriff Morgan had reason to know about the raid, the only evidence before the Court was what the Sheriff *had been told* after the first raid. There was no evidence before the Court of Appeals as to what the Sheriff *had not been told*. Pet. App. 19.

The purportedly new information that Morgan claims he presented on remand, was something that should have been presented to the District Court and the Eleventh Circuit the first time around. The decision of the Eleventh Circuit demonstrated the danger of not applying the law of the case doctrine. Litigants like Sheriff Morgan will file summary judgment motions, lose them, perhaps take appeals, and then file new motions on the theory that

they forgot to include something the last time around. It was Morgan's fault that purportedly new information was not presented earlier. In essence the Court of Appeals has opened the door to litigants that would allow them to waste the Court's and the parties' time and resources. The purportedly new information that Morgan claims he presented on remand was something that should have been presented to the District Court and the Eleventh Circuit the first time around. The decision of the Eleventh Circuit demonstrated the danger of not applying the law of the case doctrine. The result in *Swint II* is contrary to the principle set out in *Montana v. United States*, 440 U.S. 147, 153 (1979). In Montana, the Court noted that the purpose of the law at the case doctrine is:

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

440 U.S. at 605. By holding to the contrary based upon information and arguments that had already been presented, the Eleventh Circuit's decision affirming the District Court's ruling on remand violated the law of the case.

This Court has held in the past that it has the power to correct certain errors and to make modifications in the decree. *Arizona v. Califorina*, 460 U.S. 605, 619 (1983).

IV. THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW AND AFFECTS THE EFFICIENCY OF THE JUDICIAL PROCESS.

This is an important issue of federal law. A number of cases are brought against local governments under § 1983 in Alabama and elsewhere, for the actions of high officials, particularly in the area of law enforcement. The theory employed by the Eleventh Circuit is not necessarily limited to Alabama, but could be used in any state where certain officials, such as sheriffs, have absolute sway over particular areas, such as law enforcement, independent of other county officials. Indeed, under the Eleventh Circuit's theory, counties in most states would never be liable for constitutional violations committed in the arena of law enforcement. For these reasons, the decision below severely restricts the remedies available to citizens under § 1983. Also, enough complexity already exists in the interpretation of § 1983 without the added confusion and conflict created by the Eleventh Circuit's interpretation. Finally, the law of the case doctrine promotes the finality and efficiency of the judicial process and should be applied to *Swint II*.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

E. EARLE BURKE
THE LAW OFFICES OF
E. EARLE BURKE
1720 Peachtree Street, NW
Suite 470, South Tower
Atlanta, Georgia 30309
(404) 892-1210

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6229

D. C. Docket No. CV91-V-965-E

TOM SWINT, TONY SPRADLEY,
DRECILLA JAMES, JEROME LEWIS,

Plaintiffs-Appellants,

versus

CHAMBERS COUNTY COMMISSION and
SHERIFF JAMES C. MORGAN,

Defendants-Appellees,

THE CITY OF WADLEY, ALABAMA, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Alabama

(Filed December 27, 1996)

Before KRAVITCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The plaintiffs appeal the district court's grant of summary judgment on their due process claim in favor of defendant Chambers County Commission ("Chambers

County") and on their Fourth Amendment claims in favor of defendants Chambers County and Sheriff James C. Morgan ("Morgan"). We affirm.

I. FACTS AND PROCEDURAL POSTURE

This case comes back to us after we remanded it to the district court for further proceedings in *Swint v. City of Wadley, Alabama,* 51 F.3d 988 (11th Cir. 1995). The background facts and the procedural history of the first appeal are set out in that opinion. *See* 51 F.3d at 991-94. In that opinion, we declined to review the district court's denial of Chambers County's motion for summary judgment, because that denial did not meet the requirements of *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 546, 69 S. Ct. 1221, 1225 (1949), and because there is no pendant party appellate jurisdiction. *Swint,* 51 F.3d at 1002 (citing *Swint v. Chambers County Comm'n,* ___ U.S. ___, 115 S. Ct. 1203 (1995)).

We also affirmed the district court's denial of Morgan's motion for summary judgment on the plaintiffs' Fourth Amendment claim. We held that the district court properly denied Morgan's motion for summary judgment because the existence of an improper policy is sufficient to meet 42 U.S.C. § 1983 causation requirements, and Morgan's authorization of a second, identical raid at Club Capri with knowledge of how the first raid was conducted is evidence of an improper policy. *Id.* at 999-1000.

After we remanded the case to the district court for further proceedings, the plaintiffs reached a settlement agreement with several of the defendants. The following claims remained after the settlement agreement:

(1) a 42 U.S.C. § 1983 claim against both Morgan and Chambers County for violations of the plaintiffs' rights under the Fourth Amendment; and

(2) a 42 U.S.C. § 1983 claim against Chambers County for deprivation of due process.

The district court issued an order permitting Chambers County and Sheriff Morgan to file second motions for summary judgment. Chambers County argued that is not liable for Morgan's law enforcement activities, because sheriffs in Alabama are not final county policymakers in the area of law enforcement. The basis for Morgan's renewed motion for summary judgment was his affidavit, which he submitted as new evidence. In that affidavit, Morgan swore that he was never informed about the improper actions taken at the raids. The plaintiffs opposed Morgan's motion and argued that his affidavit provided no new evidence, because all of the information in the affidavit had been before the district court when it denied Morgan's first motion for summary judgment and was in the record when we decided the first appeal.

The district court granted both Chambers County's and Morgan's second motions for summary judgment. The district court held that Chambers County is not liable for Morgan's law enforcement activities, because sheriffs in Alabama are not final county policymakers in the area of law enforcement. The district court also held that the new information supplied by Morgan's affidavit was sufficient to eliminate all questions of material fact regarding the plaintiffs' Fourth Amendment claims against Morgan. We affirm.

II. DISCUSSION

We review a grant of summary judgment *de novo*. *See, e.g., Gibson v. Resolution Trust Corp.*, 51 F.3d 1016, 1020 (11th Cir. 1995); *Zipperer v. City of Fort Myers*, 41 F.3d 619, 622 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 52 (1995). Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Gibson*, 51 F.3d at 1020. All evidence is viewed in a light most favorable to the non-moving party and all inferences are drawn in the non-movant's favor. *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir. 1990).

A. Claims against Chambers County

The plaintiffs seek to hold Chambers County liable for constitutional violations that resulted from the raids of Club Capri. Under *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702 (1989), and similar cases, a county may be subject to § 1983 liability for an act or decision of a county official with final policymaking authority in the area of the act or decision. *See id.* at 737, 109 S. Ct. at 2724; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298-99 (1986). However, as plaintiffs concede, our recent decision in *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996), forecloses their claim against the county in the present case. *McMillian* held that sheriffs in Alabama are not final county policymakers in the area of law enforcement. *Id.* at 1583. Because Morgan is an Alabama sheriff and because the raids of Club Capri were law enforcement activities,

Chambers County is not liable for any of Morgan's acts or decisions arising out of the raids. Therefore, Chambers County was properly awarded summary judgment.

B. Claims against Morgan

The district court also properly granted Morgan's motion for summary judgment. Morgan's affidavit provides evidence that the arrest procedures he authorized are not unconstitutional. In his affidavit, Morgan denies with particularity having had knowledge, prior to the second raid, of any of the first raid actions plaintiffs allege violated their constitutional rights. The plaintiffs have neither controverted that affidavit evidence nor have they pointed to inconsistencies in any of Morgan's statements, or to any other evidence, that would create a genuine issue of material fact about it.

Plaintiffs argue that our denial of Morgan's motion for summary judgment in the prior appeal is the law of the case. *See Lehrman v. Gulf Oral Corp.*, 500 F.2d 659, 622 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S. Ct. 1128 (1975). However, there are three recognized exceptions to the law of the case doctrine: (1) where new and substantially different evidence material to the issue has been presented after the appellate decision; (2) where controlling authority contrary to the law of the previous decision has been rendered since that decision; or (3) where the earlier ruling was clearly erroneous and would work a manifest injustice if implemented. *Flint Elec. Membership Corp. v. Whitworth*, 68 F.3d 1309, 1313 (11th Cir. 1995) (citing *United States v. White*, 846 F.2d 678, 685 (11th Cir.),

cert. denied, 488 U.S. 984, 109 S. Ct. 537 (1988)). Sheriff Morgan relies primarily on the first exception.

The plaintiffs respond that that exception is inapplicable here, because the affidavit accompanying Morgan's motion for summary judgment did not provide new, much less "substntially different, information. They contend that Morgan specifically argued in the first appeal that he did not know of those specifics of the first raid that made it unconstitutional, which is the same "new" evidence his affidavit purports to provide. However, we have examined the record carefully, and we find that, whatever Morgan may have argued, at the time of our prior decision there was no evidence precluding a factual issue about whether Morgan knew how the first raid was conducted. Although Morgan contended in the prior appeal that it was undisputed that he did not know the details of the first raid, his deposition was the sole basis for that contention. In his deposition, Morgan testified that he received information that arrests were made and illegal alcohol seized during the first raid. But Morgan was not asked during the deposition, and he did not reveal, whether that was all that he was told about the raid. During his deposition, he was silent about whether he knew at the time of the second raid how the first raid had been conducted. Thus, denial of Morgan's first motion for summary judgment was appropriate. Morgan's affidavit is new and substantially different evidence that brings the district court's judgment within the first exception to the law of the case doctrine.

Because the record, which includes the affidavit, contains uncontroverted evidence that Sheriff Morgan had no knowledge of the alleged constitutional violations

prior to authorizing the second raid, the district court properly granted Morgan's motion for summary judgment notwithstanding our prior decision in this case.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment in favor of defendants Chambers County and Morgan.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

TOM SWINT; ET AL, Plaintiffs, VS. THE CITY OF WADLEY, ALABAMA; ET AL, Defendants.	))))))))	CIVIL ACTION NO. 91V-965-E

ORDER AND JUDGMENT

(Filed Jan. 29, 1996)

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court:

1. That the Second Motions for Summary Judgment filed herein December 1, 1995, by Defendant James C. Morgan and the Chambers County Commission be, and the same are hereby, GRANTED.

2. That Plaintiffs take nothing by their Complaint herein against said Defendants Morgan and Chambers County Commission.

3. That the above-styled cause be, and the same is hereby, DISMISSED with prejudice with costs taxed against Plaintiffs, for which execution may issue.

DONE this 29th day of January, 1996.

/s/ R. E. Varner
R. E. VARNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TOM SWINT, et al.	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION**
THE CITY OF WADLEY, ALABAMA, et al.	)	**NO. 91-V-965-E**
Defendant.	)	

MEMORANDUM OPINION

INTRODUCTION

(Filed Jan. 29, 1996)

This cause is before the Court on motions for summary judgment filed pursuant to Rule 56 of the Federal Rules of Civil Procedure on December 1, 1995 by defendants James C. Morgan and Chambers County.

This lawsuit stemmed from two law enforcement raids on the Capri Club, a nightclub located in Chambers County, Alabama. The Club is located within the police jurisdiction of the city of Wadley which is in Randolph, County, Alabama. Plaintiffs Tom Swint and Tony Spradley are owners of the Club; plaintiff Drecilla James is a Club employee who was present during both of the raids; Jerome Lewis is a Club patron who was present during the second raid.

The defendants in the suit originally were the City of Wadley, Police Chief Freddie Morgan (individually and in

his official capacity); Officer Gregory Dendinger (individually and in his official capacity); Chambers County Commission; Chambers County Sheriffs Department; and Chambers County Sheriff James C. Morgan (individually and in his official capacity).

The Plaintiffs filed this suit in August of 1991. Defendants City of Wadley, Freddie Morgan, and Gregory Dendinger filed motions for summary judgment in January of 1992. Defendants Chambers County and James C. Morgan filed motions for summary judgment in February of 1992. This Court entered an order on June 2, 1992 granting summary judgment in part, and denying it in part. The Defendants appealed.

On November 3, 1993, the Eleventh Circuit Court of Appeals affirmed this Court's holdings in part, and reversed and remanded in part. *Swint v. City of Wadley, Alabama,* 5 F.3d 1435 (11th Cir. 1993), *modified,* 11 F.3d 1030 (1994). Jurisdiction for Chambers County's appeal was premised upon pendant party appellate jurisdiction. The United States Supreme Court ordered the Eleventh Circuit Court of Appeals to vacate that part of its opinion due to the Supreme Court's determination that there is no pendant party appellate jurisdiction. *Swint v. Chambers County Comm'n,* ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Accordingly, the Court of Appeals issued a revised opinion on May 9, 1995. *Swint v. City of Wadley,* 51 F.3d 988 (11th Cir.1995).

Following settlements by the City of Wadley, Freddie Morgan, and Gregory Dendinger,[1] the remaining claims are as follows:

1) Against Chambers County: Fourth Amendment Claim and Due Process Claim.

2) Against James C. Morgan: Fourth Amendment Claim.

On November 1, 1995, this Court filed an order allowing the remaining parties to file second motions for summary judgment. On December 1, 1995, both defendants filed such motions. The Plaintiffs' motions in opposition were filed on January 5, 1996. After fully considering both parties' positions, this Court is of the opinion that both defendant Chambers County's and defendant James C. Morgan's motions for summary judgment are due to be GRANTED.

FACTUAL BACKGROUND

On December 14, 1990, an undercover officer entered into the Capri Club. While inside, the officer was offered marijuana and crack cocaine for sale by a patron of the club who is not a party hereto. After purchasing the drugs, the officer left the Club and signaled for the raid to begin. Plaintiffs allege that this Task Force, consisting of about 30-40 officers dressed in black and wearing ski masks, pointed their weapons at plaintiffs Spradley and James and others who were present. Plaintiffs also allege

---

[1] As of October 31, 1995, this Court was advised that all Defendants have settled, except for Chambers County and Sheriff James C. Morgan.

that participants in the raid searched the Club's cash register and door receipts, and some currency was confiscated from the door receipts. Plaintiffs further allege that persons inside the Club were prohibited from moving or leaving until the raid, which lasted one to one and one-half hours, was over.

Only two people were arrested from this first raid: the man who sold the undercover officer drugs; and the man's younger brother, a minor, who was in possession of several marked bills used by the officer to pay for the drugs.[2]

On March 29, 1991, there was a second raid conducted at the Club. This raid was conducted in a very similar manner to the first. Again the undercover agent purchased drugs, then signaled for the raid to begin. During the raid, plaintiffs allege that law enforcement officials chambered rounds of ammunition in their weapons, pointed them, and ordered persons in the club to get down on the floor. Plaintiffs also allege that during this search several people, including plaintiff Lewis, were searched. Lewis further alleges that he was pushed outside the Club, grabbed, shoved against a wall, and had an officer point a shotgun in his face while the officer's finger was on the trigger.

Sheriff Morgan was not physically present during either raid, but he authorized both of them.

---

[2] Neither arrestee is a party to this suit.

CHAMBERS COUNTY

Section 1983 liability may not be grounded in a theory of respondeat superior. *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). A city or county government may, however, be subjected to § 1983 liability for the acts of an official who possesses "final authority to establish municipal [or county] policy with respect to the action ordered." *Pembaur v. Cincinnati*, 475 U.S. 469, 481 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986).

It is clear that a city or county may be held liable under § 1983 "only when the deprivation at issue was undertaken pursuant to [municipal or county] 'custom' or 'policy.' " *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479 (11th Cir. 1991). Policy or custom need not be legislatively enacted; rather, an "official who has 'final policymaking authority' in a certain area of the [county's] business may by his or her action subject the [county] to § 1983 liability when the challenged action falls within that authority." *Id.* at 1480 (citations omitted). "Whether a particular official has final policymaking authority is a question of state law." *Brown*, 923 F.2d at 1480 (citations omitted).

In order to determine whether Chambers County is liable for the actions of the Sheriff, this court must first determine whether Sheriff Morgan was exercising county power with final authority when he authorized the law enforcement raids in this case. In response to the Defendants' first motion for summary judgment, this Court held that the Sheriff may be the final decision-maker for the county in ferreting out crime. *Swint v. City of Wadley*,

CA No. 91-V-965-E (M.D. Ala 1992) at page 26. The Defendants immediately appealed, however, and the Court of Appeals agreed to hear the County's contentions under the doctrine of pendant party appellate jurisdiction. After hearing the County's contentions, the Court of Appeals found that the Sheriff **was not** the final decision-maker. The Plaintiffs then appealed to the United States Supreme Court who vacated that part of the opinion on jurisdictional grounds, holding that the appeal should not have been heard because there is no pendant party appellate jurisdiction. *Swint v. Chambers County Comm'n*, ___ U.S. ___, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The case was then remanded to this court without instructions as to the County's liability. Though no longer binding law, the rationale employed by the Court of Appeals in its original *Swint* Opinion, regarding the County's liability, impresses this Court and this Court now finds that the Sheriff was **not** the final decision-maker. The Supreme Court reversed the Court of Appeals only as to pendant party appellate jurisdiction. This in no way impugns the integrity of the substance of the Court of Appeals' opinion; therefore, this Court may look to the former decision for guidance.

In the original *Swint* Opinion, the Court of Appeals noted that "Alabama counties 'are authorized to do only those things permitted or directed by the legislature of Alabama,' . . . and because the State has not assigned the counties any law enforcement authority, the sheriff is not exercising county power when he authorizes a raid on suspected criminal activity within his county." *Swint*, 5 F.3d at ___ (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

Accordingly, this Court agrees that a sheriff is not the final repository of the county's general law enforcement authority, because Alabama law has not conferred general law enforcement authority upon counties. Law enforcement duties have been bestowed upon sheriffs and their deputies, not the counties.[3]

This Court is further impressed by the numerous district courts which have relied on, or held similarly to, the original *Swint* opinion, before and after the Supreme Court's decision to vacate on jurisdictional grounds. In fact, Defendants cited eight District Court cases in Alabama holding that sheriffs do not exercise policymaking authority for counties with respect to law enforcement, since the county has no law enforcement authority. *See Hope v. City of Hueytown*, No. CV-92-N-0126-S, slip opinion at 20-23 (N.D. Ala. Oct. 14, 1992) (Nelson, J.), *aff'd*, 56 F.3d 1389 (11th Cir. 1995) (affirmed without opinion); *Forehand v. Roberts*, 1992 W.L. 554241 (M.D. Ala. Aug. 11, 1992) (Albritton, J.); *Smith v. Arndt*, 1992 W.L. 547727

---

[3] Similarly, the Court of Appeals noted that respondeat superior is not available for the § 1985(3) conspiracy claim. *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979). In a § 1985 claim, just as in a § 1983 claim, a plaintiff must allege and prove each defendant's participation in the conspiracy, or a policy or custom of a municipal defendant that is causally related to the conspiracy.

No facts were alleged that the County Commission was involved in the conspiracy; therefore, there is no direct participation by the County. Additionally, because the Sheriff is not the final law enforcement decisionmaker for the county, the county cannot be held liable under § 1985(3) for the alleged actions of the Sheriff.

(N.D. Ala. July 14, 1992) (Hancock, J.); *Sanders v. Miller*, 837 F.Supp. 1106, 1109-10 (M.D. Ala. 1992); *Cofield v. Randolph County Comm'n*, 844 F.Supp. 1499, 1501-02 (M.D. Ala. 1994); *McMillian v. Johnson*, No. CV-93-A-699-N, slip opinion at 28-35 (M.D. Ala. Aug. 9, 1995) (Albritton, J.); *Warren v Coffee County*, No. 95-T-242-S, slip opinion at 13 (M.D. Ala. Aug. 9, 1995) (Thompson, J.); *Wilson v. Lowndes County, Ala.*, No. 95-T-668-N, slip opinion at 1 (M.D. Ala. Aug. 28, 1995) (Thompson, J.). As the Court of Appeals has not reversed those decisions, the Court views them as persuasive.

Accordingly, summary judgment is due to be GRANTED in favor of Chambers County because the sheriff is not the final law enforcement decision-maker for the county.[4]

SHERIFF JAMES C. MORGAN

It is well settled that government officials performing discretionary functions are entitled to immunity from civil liability for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Although this qualified immunity is often referred to as "good faith" immunity, the test is actually one of

---

[4] As this Court has held that the County is not liable for law enforcement decisions of the county, it is unnecessary to determine whether the Plaintiffs have stated a valid substantive due process claim.

objective legal reasonableness, without regard to the actor's subjective good faith. *Courson v. McMillian,* 939 F.2d 1479 (11th Cir. 1991). In order to determine whether the government official has acted with objective legal reasonableness, this Court must perform a two part analysis. The Defendant must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred," and "then the burden shifts to the plaintiff to demonstrate that the defendant violated clearly established constitutional law." *Sammons v. Taylor,* 967 F.2d 1533, 1539 (11th Cir. 1992) (quotations omitted).

The Plaintiffs do not dispute that the Sheriff was acting within his discretionary authority. The Plaintiffs do, however, contend that he acted in violation of "clearly established" law.

This Court held, and the Court of Appeals agreed, that it was "clearly established . . . that a raid of a business establishment violates the Fourth Amendment unless based on probable cause and exigent circumstances . . . " *Swint,* 51 F.3d at 995. This Court further held, and the Court of Appeals agreed, that "the arrest of one person who had sold drugs to the undercover officer did not entitle the officers to search the entire premises in which he was located" and "[n]o reasonable law enforcement officer in the circumstances presented here could have believed that probable cause existed to search the entire Club and seize all of its occupants." *Id.* 51 F.3d at 998.[5] Sheriff Morgan, however, did not personally

---

[5] Defendants also contended that the raids were administrative inspections of private commercial property, and,

participate in either raid; therefore, this Court must inquire further to determine whether his actions (adoption of a policy or failure to adopt a policy) violated clearly established law.

As discussed earlier, Section 1983 liability may not be grounded in a theory of respondeat superior. *Monell*, 436 U.S. at 694. Accordingly, § 1983 liability requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). "[I]t is clear that the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir. 1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) (interpreting *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The requirement for an affirmative causal connection may be met by showing an improper policy or the absence of a policy. *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991). Sheriff Morgan will only be liable, however, if "a policy or custom that he has established or utilized results in deliberate indifference to [the Plaintiffs'] constitutional rights." *Zatler*, 802 F.2d at 402.[6] Hence, if Sheriff Morgan had a

---

as such, were not violative of the Fourth Amendment. This argument has also been rejected by this Court and the Court of Appeals. *Swint*, 51 F.3d at 998-999.

[6] The standard for the failure to adopt an adequate policy is essentially the same. "[A]ny alleged failure to adopt adequate policies . . . must amount to a breach of [the Defendant's] duty and must evidence reckless disregard or deliberate indifference to [the Plaintiff's] constitutional rights." *Zatler*, 803 F.2d at 402.

reasonable[7] basis for believing that his policies and training were adequate, then he is entitled to qualified immunity and summary judgment. *See Swint*, 51 F.3d at 999.

This Court denied Sheriff Morgan's original motion for summary judgment due to this Court's belief that, based on the facts known to the Court **at that time**, there was a genuine issue of material fact "as to whether the raids were causally connected to Sheriff Morgan's approval of the two raids and to his policy encouraging these raids." *Swint v. City of Wadley*, CA No. 91-V-965-E (M.D. Ala. 1992). The Court of Appeals recognized two reasons to deny the Sheriff's original summary judgment motion; (1) the Court of Appeals upheld this Court's denial of summary judgment which was based on certain statements which **could** (but did not necessarily) evidence an improper policy; and (2) the Court of Appeals added that "even if Sheriff Morgan had a reasonable basis for believing that his policies and training were adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better." *Swint*, 51 F.3d at 999.

Subsequent to this Court's original opinion, and the several Court of Appeals' opinions, new evidence has been presented as to what the Sheriff's policy was, and what the Sheriff knew following the first raid.

---

[7] Using the test of objective legal reasonableness. *Courson v. McMillian, supra.*

1. Sheriff Morgan's Policy Originally

In denying the Sheriff's first motion for summary judgment, this Court expressed a concern over certain statements made by Sheriff Morgan and Officer Birchfield. Officer Birchfield swore in a 1992 affidavit that it was Sheriff Morgan's policy not to initiate a narcotics raid on a business establishment or a home unless there was either a search warrant **or a drug buy** (County's Ex. A, Birchfield Affidavit, ¶ 26). Similarly, Sheriff Morgan swore in a 1992 affidavit that "[i]t is common practice that if a drug buy takes place, **a drug raid may take place** to arrest those responsible" (County's Ex. D, Morgan Affidavit, ¶ 4). **Without further elaboration**, this Court was concerned that these statements could evidence a policy which encouraged overly broad searches (or raids) such as the one alleged in this case.

In connection with his Second Motion for Summary Judgment, Sheriff Morgan filed a Supplemental Affidavit. In this affidavit, Sheriff Morgan elaborated on what his policies were, or more importantly, what they were not.

> [A]n arrest based on probable cause could be made when a confidential informant was able to identify the person from whom he had bought illegal narcotics. **That person** could be searched incident to a probable cause arrest. **It was not my policy** that non-suspects could be searched, **no was it my policy** that business premises could be searched unless probable cause and exigent circumstances justified such a search.

(Supp'l Affidavit of James C. Morgan ¶ 12) (emphasis added).

Sheriff Morgan further elaborated that he never authorized (nor is he aware of) anyone being searched or detained, except those identified by the informant or undercover officer (Supp'l Affidavit of James C. Morgan ¶ 18).

Plaintiffs argue that Sheriff Morgan's affidavit provides no new evidence to the Court. However, due to this Court's concern about the policy of the Sheriff, as expressed in its original denial of summary judgment, this Court considers Sheriff Morgan's clarification to be extremely pertinent.

When a party makes a motion for summary judgment and provides supporting affidavits or testimony, the adverse parties' response must set forth specific facts showing there is a genuine issue for trial. FED. R. CIV. P. 56(e). The Plaintiffs essentially posited two responses to the Sheriff's Second Motion for Summary Judgment. First, Plaintiffs contend that nothing new has been presented since this Court and the court of Appeals ruled on this issue. As mentioned above, this Court believes that Sheriff Morgan's affidavit **does** provide new information (which has not been refuted by the Plaintiffs) which addresses the specific concerns expressed by this Court in its earlier denial of summary judgment.

Second, Plaintiffs contend that other testimony in Sheriff Morgan's deposition evidences a genuine issue of material fact. Plaintiffs cite Morgan's testimony in his deposition as indicating a policy to "control the crowd" in an establishment when someone in the establishment is being arrested for selling drugs. Morgan testified that:

> [I]f you were going to a drug operation at any business where you had a goodly number of people who were drinking alcohol, possibly using drugs, since you're doing a drug operation, then you certainly want to get somebody in that can take charge of the crowd.

(Morgan Dep. at 19).

Plaintiffs contend that this testimony evidences a policy which allows for unconstitutional raids, thus provides a genuine issue of material fact as to whether the Sheriff had improper policies. Plaintiffs suggest that the Sheriff's policy should be to "wait and arrest the person who sold the drugs when that person leaves the club" (Pls.' Mem. in Opp. to Second Motion for Sum. Judgment at P. 8). Obviously, such a policy is not practical. This would allow innumerable opportunities for the dealer to hide or sell the remaining evidence. It also provides the dealer sufficient time to learn of the awaiting officers and attempt to evade them. Moreover, in *Swint*, 51 F.3d at 997, the Court of Appeals, referring to the facts of this case, stated that where immediately before a raid, an undercover officer completed a drug buy, there is no question that probable cause exists to arrest and search the "narcotics peddler." The Court then described the entry of the SWAT team and other members of the task force who sought to identify, arrest and remove the drug seller from the Capri Club. *Swint*, F.3d at 997. Having described this scenario, the Court of Appeals then stated,

> If that had been the extent of the intrusion on these two occasions, this would be a different case. But that was not the end of the intrusion. On the contrary, the officers proceeded to detain at gunpoint dozens of citizens for an hour and a

> half, search a number of them, and search the premises as well.

Swint, 51 F.3d at 997.

The Court of Appeals clearly would not require officers to wait outside an establishment for a drug dealer to voluntarily leave, hoping the dealer would be kind enough to bring along all evidence of the earlier transactions.

Sheriff Morgan's Supplemental Affidavit presented evidence that his policies were fully in line with the constitutional standards. The Plaintiffs have not presented any testimony, or any other evidence, to contradict Sheriff Morgan's sworn statement as to his policy. Accordingly, Sheriff Morgan has presented sufficient, additional evidence to change the opinion of this Court as to its original grounds for denying summary judgment. This Court finds that there is no evidence that it was Sheriff Morgan's policy to search or detain non-suspects, nor that it was his policy to search an entire business premises unless probable cause and exigent circumstances justified such a search. Furthermore, no evidence has been presented which would indicate that Sheriff Morgan had any reason to doubt that his policies and training were adequate (at least going into the first raid).

2. Sheriff Morgan's Policy After The First Raid

In affirming this Court's original denial of summary judgment, the Court of Appeals added a second reason this court could have denied that motion. The Court of Appeals stated that "even if Sheriff Morgan had a reasonable basis for believing that his policies and training were

adequate going into the first raid, that fails to explain why he authorized exactly the same conduct three months later in March of 1991, when he had reason to know better." *Swint*, 51 F.3d at 999.

Again, the standard for determining the Sheriff's liability is whether there is an affirmative causal connection between the Sheriff's alleged acts or omissions and the alleged constitutional deprivation. The requirement for an affirmative causal connection may be met by showing an improper policy or the absence of a policy. *Rivas v. Freeman*, 940 F.2d 1491, 1495 (11th Cir. 1991). The Sheriff's act (adoption of improper policy) or omission (failure to adopt adequate policy) must amount to reckless disregard or deliberate indifference to Plaintiffs' constitutional rights, *Zatler v. Wainwright*, 802 F.2d 397, 401-402 (11th Cir. 1986), and the policy (or lack of policy) must be causally related to the alleged deprivation.

At the time the Court of Appeals found that Sheriff Morgan had reason to know about the raid, the only evidence before the Court was what the Sheriff **had been told** after the first raid. There was no evidence before the Court of Appeals as to what the Sheriff **had not been told.**

In his supplemental affidavit, Sheriff Morgan testified that he was never informed about the alleged improper actions taken at the raids (Supp'l Affidavit of James C. Morgan ¶ 18). Plaintiffs have pointed to no inconsistencies in Sheriff Morgan's statements, nor have Plaintiffs presented any evidence to contradict these statements. Additionally, the Plaintiffs have not presented any evidence that anyone told, or could have told,

the Sheriff about the alleged improper actions at the raid. Accordingly, this Court must accept the statements of Sheriff Morgan as fact.

Plaintiffs' only response to Sheriff Morgan's supplemental affidavit, other than contending it offered nothing new, was to assert that a jury could "conclude he is being inaccurate" (Pls.' Mem. in Opp. to Second Motion for Sum. Judgment at P. 9).[8] The Plaintiffs are attempting to create a factual issue as to Sheriff Morgan's credibility. Plaintiffs have failed, however, to present any evidence calling Sheriff Morgan's credibility into question. "[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Curl v. Int'l Business Machines Corp.*, 517 F.2d 212, 213 (5th Cir. 1975) (quoting *Rinieri v. Scanlon*, 254 F.Supp. 469, 474 (S.D.N.Y. 1966)).

The Sheriff, absent evidence to the contrary, had a right to rely upon his officers' representations about the first raid in authorizing the second raid. *See United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 747 (1965) (upholding warrant based upon representations of other officers); *United States v. Kirk*, 781 F.2d 1498, 1505 (11th

---

[8] Plaintiffs also contended that a genuine issue existed due to the Sheriff's deposition testimony about "controlling the crowd." This contention, however, was previously covered and rejected. *See, supra* pp. 13-14.

Cir. 1986) (allowing warrant to be based upon the observations of fellow officers). Sheriff Morgan's uncontradicted testimony shows that he was not informed of any improper actions occurring at the first raid (Supp'l Affidavit of James C. Morgan ¶ 18); therefore, it was reasonable for him to rely upon his officers' representations to him when authorizing the second raid.

Without refuting Sheriff Morgan's testimony about his policies or his knowledge of the alleged events at the first raid, Plaintiffs have failed to point to any facts which could show that Sheriff Morgan's policies, or his failure to adopt new policies after the first raid, amounted to deliberate indifference to the Plaintiffs' constitutional rights.

This Court is also impressed that the Plaintiffs have only alleged one other incident in which their constitutional rights were infringed (the first raid). It could hardly be said that one incident constitutes a "policy" or "custom." Practically an identical contention was made by the plaintiffs in *McLaughlin v. City of LaGrange*, 662 F.2d 1385 (11th Cir. 1981). In *McLaughlin*, one of the plaintiffs was beaten by a certain officer in 1979. The Plaintiff complained to one of the defendants (the Chief of Police) and, apparently, no action was taken. In 1980, several inmates (including the one previously beaten) were severely beaten by the same officer. The plaintiffs attempted to justify liability of the Chief by asserting a "custom" or "policy" as evidenced by his lack of action after the first incident. The Court of Appeals, affirming the District Court's grant of summary judgment for the

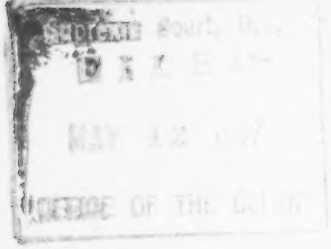
Chief, held that "[t]his isolated incident does not establish either 'custom' on the City's part or culpable nonfeasance sufficient to constitute 'malicious intent' on Chief Shepherd's part." *McLaughlin*, 662 F.2d at 1388. Similarly, the isolated incident of the first raid, without more, does not establish a "policy" or "custom" sufficient to warrant liability for Sheriff Morgan.

CONCLUSION

For the reasons stated above, this Court finds that both Defendant James C. Morgan's motion for summary judgment and Defendant Chambers County's motion for summary judgment are due to be GRANTED. A separate order and judgment will be entered in accordance with this memorandum opinion.

DONE this 29th day of January, 1996.

/s/ R. E. Varner
ROBERT E. VARNER
UNITED STATES DISTRICT
JUDGE



No. 96-1537

In The

Supreme Court of the United States

October Term, 1996

TOM SWINT, TONY SPRADLEY,
DRUCILLA JAMES and JEROME LEWIS,

Petitioners,

v.

CHAMBERS COUNTY COMMISSION
and JAMES C. MORGAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

*KENDRICK E. WEBB
BART HARMON
WEBB & ELEY
166 Commerce Street, Suite 300
Post Office Box 238
Montgomery, Alabama 36101-0238
(334) 262-1850
Counsel for Respondents
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS NOT TO GRANT THE WRIT 2

I. FINDINGS BY THE COURTS BELOW THAT THERE IS NO EVIDENCE THAT SHERIFF MORGAN COMMITTED A CONSTITUTIONAL VIOLATION AND A RECENT HOLDING OF THIS COURT ELIMINATING PETITIONERS' DUE PROCESS CLAIM NECESSARILY MEAN THAT NO LIABILITY EXISTS FOR CHAMBERS COUNTY, EVEN IF MORGAN IS FOUND TO BE ITS POLICYMAKER 2

II. THE ELEVENTH CIRCUIT'S DETERMINATION THAT, UNDER ALABAMA LAW, LOCAL SHERIFFS ARE NOT POLICYMAKERS FOR THE COUNTY GOVERNMENT IS A PROPER APPLICATION OF THIS COURT'S GUIDANCE IN *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989) 6

TABLE OF CONTENTS – Continued

Page

A. *Pembaur, Praprotnik* and *Jett* Emphasize the Importance of State Law in Determining Who Is a Policymaker and for Whom He Makes Policy; They Do Not Dictate Uniformity of Results When Their Principles Are Applied to Different Local Law Contexts 7

B. The Eleventh Circuit in *McMillian* Properly Applied the Principles of *Pembaur, Praprotnik* and *Jett* in the Context of Local Law to Determine That Sheriffs in Alabama Are Not Law Enforcement Policymakers for Local Counties 10

C. Additional Aspects of Alabama Law Support the Conclusion That Sheriffs Are Not Final Policymakers for the County in the Field of Law Enforcement 14

III. IMPOSING LIABILITY UPON CHAMBERS COUNTY, GIVEN THE COUNTY'S LACK OF LAW ENFORCEMENT AUTHORITY UNDER ALABAMA LAW, WOULD UNDERCUT THE BASIC FOUNDATIONS OF MUNICIPAL LIABILITY AS ARTICULATED IN *MONELL* 18

A. Petitioners' Argument Cannot Be Squared With the Primary Factor That Led This Court to Recognize Municipal Liability in *Monell* – the Status of Municipalities as Separate "Corporations" Under State Law..... 19

B. Petitioners' Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*..... 21

TABLE OF CONTENTS – Continued

Page

1. Origins of the Causation Requirement 21

2. Application of the Requirement to This Case 23

IV. LOGICALLY, IF A SHERIFF IS A *STATE* OFFICER FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, HE SHOULD NOT BE DEEMED A *COUNTY* POLICY-MAKER 25

V. THE ELEVENTH CIRCUIT'S RELIANCE ON AN EXCEPTION TO THE "LAW OF THE CASE" DOCTRINE DOES NOT PRESENT AN ISSUE APPROPRIATE FOR CERTIORARI 26

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 3, 5

Arizona v. California, 460 U.S. 605 (1983).....26, 27

Bishop v. Wood, 426 U.S. 341 (1976)..... 8

Brockett v. Spokane Arcades, Inc. 472 U.S. 491 (1985) 8

Carr v. City of Florence, Ala., 916 F.2d 1521 (11th Cir. 1990) 25

City of Los Angeles v. Heller, 475 U.S. 796 (1986)....3, 5

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) ...*passim*

Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992)..... 25

Etowah County Comm'n v. Hayes, 569 So. 2d 397 (Ala. 1990) 18

Ex parte Purvis, 689 So. 2d 794 (Ala. 1996) 14

Free v. Granger, 887 F.2d 1552 (11th Cir. 1989) 25

Geneva County Comm'n v. Tice, 578 So. 2d 1070 (Ala. 1991) 18

Hereford v. Jefferson Co., 586 So. 2d 209 (Ala. 1991) 14

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) *passim*

King v. Colbert County, 620 So. 2d 623 (Ala. 1993) 18

Lockridge v. Etowah County Comm'n, 460 So. 2d 1361 (Ala. Civ. App. 1984).....12, 17

McMillian v. Johnson, 88 F.3d 1573 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 554 (1996)..... *passim*

Monell v. Department of Social Servs., 436 U.S. 658 (1978) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Parker v. Amerson, 519 So. 2d 442 (Ala. 1987) ... 14, 15, 17

Parker v. Williams, 862 F.2d 1471 (11th Cir. 1989) 15, 25

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)....*passim*

Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) 15

Siegert v. Gilley, 500 U.S. 226 (1991) 19

Swint v. City of Wadley, Ala., 5 F.3d 1435 (11th Cir. 1993)..... 5, 11, 23

Swint v. City of Wadley, Alabama, 11 F.3d 1030 (11th Cir. 1994) 5

Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) 17

United States v. S.A. Empressa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984) 8

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 26, 27

STATUTES

42 U.S.C. § 1983..... *passim*

Ala. Code § 11-1-1..... 15

Ala. Code § 11-3-1..... 15

Ala. Code § 11-3-10 15

Ala. Code § 11-3-11 15

Ala. Code § 11-14-10 .....15, 18

Ala. Code § 12-17-180 16

Ala. Code § 12-17-24 16

Ala. Code § 14-6-1..... 16

TABLE OF AUTHORITIES – Continued

Page

Ala. Code § 14-6-84 16

Ala. Code § 14-6-85 16

Ala. Code § 14-6-86 16

Ala. Code § 14-6-90 16

Ala. Code § 14-6-98 16

Ala. Code § 36-22-16 18

Ala. Code § 36-22-18 18

Ala. Code § 36-22-2(3) 16

Ala. Code § 36-22-3 1

Ala. Code § 36-22-3(1) 16

Ala. Code § 36-22-3(4) 11, 16

Ala. Code § 36-22-5 16

Local Act No. 96-630 (1996) 18

Local Act No. 87-841 (1987) 18

CONSTITUTIONAL PROVISIONS

U. S. Const. amend XI 1

Ala. Const. art. I, § 14 14

Ala. Const. art. V, § 112 ..... 1, 14, 15

Ala. Const. art. V, § 121 ..... 16, 17

Ala. Const. art. V, § 138 ..... 1, 15, 17

Ala. Const. art. VII, § 174 ..... 1, 17

TABLE OF AUTHORITIES – Continued

Page

Ala. Const. art. VII, § 175 17

Ala. Const. art. VII, § 3 (1875) 17

OTHER AUTHORITY

Fed. R. Civ. P. 50(a) 28

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Chambers County Commission and James C. Morgan respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional provisions directly at issue in the questions raised by the Petition for a Writ of Certiorari are the Fourth Amendment, the Eleventh Amendment and the Fourteenth Amendment. The only statutory provision involved is 42 U.S.C. § 1983.

State constitutional provisions which are involved in the issues before the Court include: Ala. Const. of 1901, art. V, § 112; art. V, § 138; art. VII, § 174 and amend. No. 35. State statutory provisions involved include: Ala. Code § 36-22-3; Local Acts of Alabama Nos. 1180, 96-630, 87-481. The texts of the local acts are reproduced in the Appendix.

STATEMENT OF THE CASE

Upon review of the Petitioners' "Statement of the Case", Respondents do not perceive any misstatements of the facts which would have a bearing on the "question of

what issues would properly be before the Court if certiorari were granted" except the following: the Petitioners state that the first appeal arose out of "various motions to dismiss." Pet. 2. That is incorrect. The appeal arose out of the denial of summary judgment. Also, the Petitioners allude to an alleged "concession that the Court already held that there was sufficient evidence against [Morgan] to require a trial." Pet. 4. Respondents deny making such a concession. Perhaps the Petitioners are referring to an argument made in the alternative, i.e., that, assuming for the sake of argument that sufficient evidence existed, Sheriff Morgan would still be entitled to qualified immunity. Respondents deny that this is a "concession" in the sense intended by the Petitioners.

REASONS NOT TO GRANT THE WRIT

I. FINDINGS BY THE COURTS BELOW THAT THERE IS NO EVIDENCE THAT SHERIFF MORGAN COMMITTED A CONSTITUTIONAL VIOLATION AND A RECENT HOLDING OF THIS COURT ELIMINATING PETITIONERS' DUE PROCESS CLAIM NECESSARILY MEAN THAT NO LIABILITY EXISTS FOR CHAMBERS COUNTY, EVEN IF MORGAN IS FOUND TO BE ITS POLICYMAKER.

On page 5 of the petition, Swint[1] contends that his petition should be granted because the same issue is presented in *McMillian v. Monroe County*, No. 96-452,

[1] For the sake of brevity, Respondents will refer to the Petitioners collectively as "Swint".

where this Court granted certiorari and decision is pending. That reasoning, however, is suspect considering an important distinction between the two cases. In *McMillian*, Sheriff Tate has been denied qualified immunity on several grounds and most likely will face a trial on the question of whether he violated Walter McMillian's constitutional rights. In the instant case, the lower courts have found that there is no evidence to support a claim that Sheriff Morgan violated the Petitioners' constitutional rights on two of Petitioners' three claims. This Court's holding in *Albright v. Oliver*, 510 U.S. 266 (1994) removes any basis for Petitioners' third and final claim. Consequently, even assuming for the sake of argument that this Court in *McMillian* finds that Alabama sheriffs are county policymakers, there would still be no basis for liability against Chambers County in this case where the "policymaker" has inflicted no constitutional injury. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (stating that "[none] of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm").

The Petitioners' prior claims against the Respondents arose out of the Fourth Amendment, the Equal Protection Clause, and the Due Process Clause. The first two of these claims against Sheriff Morgan have been stricken under circumstances which indicate there was insufficient evidence for a jury to find a constitutional violation. With respect to the Fourth Amendment, the district court below, in its January 29, 1996 opinion, found the following:

> Sheriff Morgan's Supplemental Affidavit presented evidence that his policies were fully in line with the constitutional standards. The Plaintiffs have not presented any testimony, or other evidence, to contradict Sheriff Morgan's sworn statement as to his policy. Accordingly, Sheriff Morgan has presented sufficient, additional evidence to change the opinion of this Court as to its original grounds for denying summary judgment. This Court finds that there is no evidence that it was Sheriff Morgan's policy to search or detain non-suspects, nor that it was his policy to search an entire business premises unless probable cause and exigent circumstances justified such a search. Furthermore, no evidence has been presented which would indicate that Sheriff Morgan has any reason to doubt that his policies and training were adequate, at least going into the first raid. . . . Without refuting Sheriff Morgan's testimony about his policies or his knowledge of the alleged events at the first raid, Plaintiffs have failed to point to any facts which could show that Sheriff Morgan's policies, or his failure to adopt new policies after the first raid, amounted to deliberate indifference to the Plaintiffs' constitutional rights.

Pet. App. 23, 26. The Eleventh Circuit affirmed this finding of fact. Pet. App. 5 ("the plaintiffs have neither controverted that affidavit evidence nor have they pointed to inconsistencies in any of Morgan's statements, or to any other evidence, that would create a genuine issue of material fact about it"); *Id.* at 6-7 ("Because the record, which includes the affidavit, contains uncontroverted evidence that Sheriff Morgan had no knowledge of the alleged constitutional violations prior to authorizing a

second raid, the district court properly granted Morgan's motion for summary judgment . . . ").

Although the district court judge denied Morgan summary judgment on the equal protection clause and that ruling was originally affirmed, *see Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1447 (11th Cir. 1986); upon rehearing, the Eleventh Circuit "reverse[d] the denial of summary judgment to Sheriff Morgan on the equal protection claims." *Swint v. City of Wadley, Alabama*, 11 F.3d 1030, 1031 (11th Cir. 1994). This reversal was based on the fact that the court found "no evidence that Sheriff Morgan's actions in authorizing the raids on the Club were motivated by intentional racial discrimination[;] there is no genuine issue of material fact in so far as the equal protection claims relate to him." *Id.*

Finally, Sheriff Morgan was awarded qualified immunity on the substantive due process claim after the Eleventh Circuit found no violation of clearly established law. Because Sheriff Morgan was granted qualified immunity based on a lack of clearly established law, it is conceivable that Petitioners' substantive due process claim might remain viable against Chambers County. However, subsequent authority from this Court forecloses Petitioners' substantive due process claims. *See Albright v. Oliver*, 510 U.S. 266, 273-274 (1994) (holding that the substantive due process clause could not be invoked where protection against government intrusion is provided by other constitutional provisions).

Based on the reasoning in *Heller, supra*, because no claim remains viable against Morgan and therefore no jury could find that Sheriff Morgan violated Petitioners'

constitutional rights, Chambers County would be free from liability as well, even assuming Sheriff Morgan is its policymaker. Thus there is no basis for the granting of certiorari on the county liability issue.

II. THE ELEVENTH CIRCUIT'S DETERMINATION THAT, UNDER ALABAMA LAW, LOCAL SHERIFFS ARE NOT POLICYMAKERS FOR THE COUNTY GOVERNMENT IS A PROPER APPLICATION OF THIS COURT'S GUIDANCE IN *PEMBAUR V. CITY OF CINCINNATI*, 475 U.S. 469 (1986), *CITY OF ST. LOUIS V. PRAPROTNIK*, 485 U.S. 112 (1988), AND *JETT V. DALLAS INDEP. SCHOOL DIST.*, 491 U.S. 701 (1989).

Petitioners challenge the Eleventh Circuit's determination that Alabama sheriffs are not final *county* policymakers in the area of law enforcement primarily because the decision is, in their view, inconsistent with this Court's holding in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (plurality opinion). Indeed, *Pembaur* did accept the Sixth Circuit's conclusion that, under Ohio law, sheriffs and prosecutors are county officials authorized to establish official law enforcement policy for the county. 475 U.S. 476. However, *Pembaur* cannot fairly be characterized as establishing a universal principle that, under the laws of all states, sheriffs will be considered final policymakers for counties with respect to law enforcement activities. To the contrary, *Pembaur* and its progeny recognize that since no two states are going to define policymaking authority identically, the various circuit courts of appeal should make independent evaluations of each state's law and these evaluations are due to be

afforded "great deference." *See Pembaur*, 475 U.S. at 484 & n. 13; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124-25 (1988) (plurality opinion); and *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 737-38 (1989).

Praprotnik and *Jett* make it clear that the question presented by petitioner must be resolved on the basis of *state* law. *See Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123 (plurality opinion). Because the Eleventh Circuit properly based its decision on an analysis of Alabama law, the holding below is consistent with the legal principles articulated in *Pembaur*.

A. *Pembaur, Praprotnik* and *Jett* Emphasize the Importance of State Law in Determining Who Is a Policymaker and for Whom He Makes Policy; They Do Not Dictate Uniformity of Results When Their Principles Are Applied to Different Local Law Contexts.

In *Pembaur*, this Court wisely refused to delve into the minutiae of Ohio state law and re-examine the Sixth Circuit's basis for holding Ohio counties liable for the misconduct of sheriffs and prosecutors. Instead, the Court merely accepted the Sixth Circuit's determination as being the "definitiv[e] constru[ction] . . . " of Ohio law and proceeded to analyze the county's liability under § 1983 taking the Sixth Circuit's determination as a given. 475 U.S. at 491 (O'Connor, J., concurring). Justice Brennan, in writing for the plurality, consistently referred to the description of Ohio sheriffs as final county policymakers as being the Sixth Circuit's conclusion, not the conclusion of this Court.

> Based upon *its* examination of Ohio law, the *Court of Appeals* found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement.

475 U.S. at 476 (citation omitted) (emphasis added); *see also* 475 U.S. at 484 ("[T]he *Court of Appeals* concluded, based upon *its* examination of Ohio law . . . ") (emphasis added). Because the Sixth Circuit's determination on the issue of final policymaking authority necessarily arises out of state law, 475 U.S. 483, this Court, as is its practice in matters involving state law, afforded the determination "great deference." 475 U.S. at 484 n. 13 (*citing United States v. S.A. Empressa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 815 n. 12 (1984); *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 499-500, 105 S. Ct. 2794, 2799-2800, 86 L. Ed. 2d 394 (1985) (citing cases); and *Bishop v. Wood*, 426 U.S. 341, 345-347, 96 S. Ct. 2074, 2077-2078, 48 L. Ed. 2d 684 (1976)).

Since *Pembaur* was released, this Court has revisited the question of final policymaking liability in two cases, one of which is not cited in Swint's Petition for Certiorari. Although neither of the cases involve county sheriffs, both look to state law on the issue and, just as significantly, defer to the court of appeal's construction of state law.

In *City of St. Louis v. Praprotnik, supra*, the Plaintiff, once a management-level city employee, contended that the City demoted him and later terminated his employment without due process of law and in retaliation for the exercise of protected free speech. 485 U.S. at 114-17.

Instead of looking to local law to see where final policymaking authority for employment was vested, as *Pembaur* suggested, the court of appeals ignored the most relevant portions of local law and broadly defined the term "municipal policymaker." 485 U.S. at 131. This Court, in reversing the Eighth Circuit, warned that "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." 485 U.S. at 126. Furthermore, the Court recognized that since states have "wide latitude" in structuring the powers given to local governments, the question of who retains final policymaking authority will be answered in a variety of ways. 485 U.S. at 124-25.

Most recently, in *Jett v. Dallas Indep. School Dist., supra,* this Court addressed the issue of final policymaking authority in yet another context. In *Jett,* a high school football coach alleged that both the school principal and the district superintendent had him demoted and transferred in retaliation for the exercise of protected free speech and because of racial animus. Jett sued the school district contending that the district had delegated to the principal and superintendent final policymaking authority in the matter of employment. From a substantial plaintiff's verdict, the school district appealed on the ground that the plaintiff had failed to prove that the individual defendants' conduct represented official school district policy. The Fifth Circuit Court of Appeals agreed with the school district and reversed on this ground. Although generally affirming the Fifth Circuit's reversal of the district court, this Court remanded the issue of final policymaking authority to the Court of

Appeals with instructions for the court to examine Texas law on the issue. 491 U.S. at 737-38. Again, great deference is shown, in this case prospectively, to the court of appeals' determination as to state law. "We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether [the defendant] possessed final policymaking authority. . . . " *Id.*

B. The Eleventh Circuit in *McMillian* Properly Applied the Principles of *Pembaur, Praprotnik* and *Jett* in the Context of Local Law to Determine That Sheriffs in Alabama Are Not Law Enforcement Policymakers for Local Counties.

In *McMillian v. Johnson*, 88 F.3d 1573, 1577-78 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 554 (1996)[2], the Eleventh Circuit Court of Appeals sets out general principles of municipal liability which can be gleaned from *Monell, Jett, Praprotnik,* and *Pembaur*. Significantly, Swint's petition fails to point out exactly where the Eleventh Circuit departed from the principals stated in *Pembaur, Praprotnik,* and *Jett*. Instead, Swint is content to point out the result of the Sixth Circuit's analysis in *Pembaur,* note the similarities between Ohio sheriffs and Alabama sheriffs, ignore the stark differences, and demand the same result from the Eleventh Circuit when applying Alabama law. This approach is overly simplistic.

---

[2] Respondents refer to *McMillian* because it is in that opinion that the Eleventh Circuit fully sets out its reasoning with respect to county liability for the acts of sheriffs. *See* Pet. App. 4.

After analyzing this Court's most recent pronouncements on the issue of municipal policymaking liability, the Eleventh Circuit took what it called a "fresh look" at its prior holding in *Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), which had been vacated by this Court on jurisdictional grounds. *McMillian*, 88 F.3d at 1578. In *Swint*, the Eleventh Circuit, facing the identical question presented by the instant case, determined that Alabama sheriffs are not final policymakers for the county with respect to law enforcement. The court's reasoning was founded upon the inescapable conclusion that Alabama counties possess no law enforcement authority. *See id.* In reaffirming the reasoning of the original *Swint*, the court pointed out how closely associated Alabama sheriffs are with state as opposed to county government. First, Alabama sheriffs are state officers and not county officials and, therefore, counties are not liable for the actions of sheriffs, according to state law, under a *respondeat superior* theory. *Id.* In fact, the "critical question" decided in *Swint*, and re-examined in *McMillian*, was "whether an Alabama sheriff exercises *county power* with final authority when taking the challenged action." *Id.* (emphasis added). The Eleventh Circuit answered that question in the negative in both *Swint* and *McMillian* because Alabama grants law enforcement authority to sheriffs and not counties. *Id.*; *see* Ala. Code § 36-22-3(4) (1991) ("It shall be the duty of the *sheriffs* in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to gather evidence of crimes in their counties. . . . ") (emphasis added). This statutory grant of power directly to sheriffs is significant because, under

Alabama's governmental structure, county governments can only exercise the authority explicitly granted them by the state legislature. *Id.* (citing *Lockridge v. Etowah County Comm'n*, 460 So. 2d 1361, 1363 (Ala. Civ. App. 1984)).

The court then explains why it is convinced that a municipality must possess power in a particular area before it can incur liability for an official's actions in that area. Pet. App. 8a. Such a conclusion is rooted in the description of a municipal policymaker as the official with final decisionmaking responsibility "in any given area of a local government's business." *Id.* (quoting *Praprotnik*, 485 U.S. at 125). Based on that language, the court properly concluded that, in a case like the instant one, the threshold question is "whether the official [was] going about the local government's business" when the alleged violation occurred? *Id.* The opinion then listed a variety of other circuits which had asked similar questions in similar contexts. *Id.* at 1578-79.

The court also addresses the illogic of the position that because the sheriff's law enforcement authority is unreviewable within the county and he possesses no significant law enforcement authority outside the county, the authority he holds must derive *from* the county. If, as *Praprotnik* concludes, different entities can share final policymaking authority, it naturally follows that one policymaker's actions could support municipal liability even though other policymakers possessed final policymaking authority and set different policy. *Id.* at 1579. The court analogized to a scenario where a particular city council could authorize its police department precinct commanders to set their own arrest policies without creating a patchwork quilt of precinct liability; liability would still

attach only to the municipality which had delegated its final policymaking authority to each precinct commander. *Id.*

In the next major section of the *McMillian* opinion, the court of appeals below addressed Swint's contention that either this Court's or the Sixth Circuit's ruling in *Pembaur* "controls" the result in the instant case. *Id.* at 1579-80. The Eleventh Circuit properly observed that this Court's *Pembaur* opinion did not address the question of whether an Ohio sheriff is a county policymaker nor did the decision comment upon the state law factors underlying the Sixth Circuit's conclusion that Ohio sheriffs are county policymakers. *Id.* In *Pembaur*, the sole "question presented [was] whether and in what circumstances, a decision by municipal policymakers *on a single occasion* may satisfy" the *Monell* official-policy requirement. 475 U.S. at 471 (emphasis added).[3] Even if this Court's decision in *Pembaur* can be read to give implicit approval to the Sixth Circuit's reading of Ohio law, that decision would not dictate the same conclusion in this case. As the Eleventh Circuit observed, "Ohio law determined the Sixth Circuit's conclusion[; b]ut Alabama law compels our conclusion." *Id.*

The Eleventh Circuit's opinion goes on to refute Swint's claim that Alabama law and Ohio law are

---

[3] *See also* Brief of Petitioner in No. 84-1160, *Pembaur v. City of Cincinnati* (presenting, as the sole question for review, the following: "Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy as to render a county liable under 42 U.S.C. § 1983?").

virtually the same in the manner that each allocates law enforcement authority. *Id.* at 1580-81. While similarities exist, especially in election (by county electors) and fiscal support (county pays salary and funds sheriff's department), significant differences exist. First, under an explicit provision of the Alabama Constitution of 1901, sheriffs are state officers and part of the state executive department. *See* Ala. Const. art V, § 112; *Parker v. Amerson*, 519 So. 2d 442 (Ala. 1987). As stated above, because of their unique relationship with the state, Alabama sheriffs cannot create respondeat superior liability for the counties in which they operate. *See Hereford v. Jefferson Co.*, 586 So. 2d 209, 210 (Ala. 1991); *Parker v. Amerson*, 519 So. 2d at 442. Significantly, the association of Alabama sheriffs with the state is so close that sheriffs are protected by Alabama's grant of sovereign immunity in Article I, § 14 of Alabama's Constitution. *McMillian*, 88 F.3d at 1580 (citing *Hereford*, 586 So. 2d at 210; *Parker v. Amerson*, 519 So. 2d at 442); *see also Ex parte Purvis*, 689 So. 2d 794, 795-96 (Ala. 1996) (noting sheriffs' constitutional status as a state officer and granting sovereign immunity). Clearly, Alabama's constitutional and statutory establishment of its sheriffs as state executive officers is much more substantial than an occasional label. There is nothing comparable in Ohio law which so closely identifies sheriffs with the state. *McMillian*, 88 F.3d at 1580.

C. Additional Aspects of Alabama Law Support the Conclusion That Sheriffs Are Not Final Policymakers for the County in the Field of Law Enforcement.

Besides the aspects of Alabama law mentioned in its opinion, other state law considerations undergird the Eleventh Circuit's determination.

Alabama, like all other states, has both a state government and county governments. Ala. Code § 11-1-1 (1975). Unlike in many states, however, Alabama counties do not have "home rule" powers and are restricted to performing relatively narrow functions expressly delegated to them by state law. These functions primarily involve construction and maintenance of the county road system, a county courthouse, and a county jail.[4] Ala. Code §§ 11-3-10, 11-3-11, 11-14-10 (1975). There is no statute authorizing counties to engage in law enforcement.

The nature of functions of the office of sheriff in Alabama are also specified by state law. There is a sheriff in each county of the State, elected by the voters of that county. Ala. Const. art. V, § 138. As mentioned above, under the Alabama Constitution of 1901, sheriffs are specifically designated as *state* executive officials. *Id.* at § 112 ("The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, *and a sheriff for each county.*") (emphasis added). As a result, they share the same sovereign immunity and Eleventh Amendment immunity accorded to other state officials. *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *Parker v. Amerson*, 519 So. 2d 442, 446 (Ala. 1987).

---

[4] This Court recognized just five years ago that the "principal function" of county commissions in Alabama "is to supervise and control the maintenance, repair, and construction of county roads." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 493-94 (1992) (citing Ala. Code §§ 11-3-1, 11-3-10).

Sheriffs in Alabama have three basic functions: assisting the state judicial system by serving process and performing other related tasks, Ala. Code § 36-22-3(1); operating the jail, *Id.* at § 14-6-1; and enforcing state law in their county, *Id.* at § 36-22-3(4). With respect to judicial functions, the sheriffs take orders from, and are supervised by, state judges when they are sitting in their counties.[5] With respect to jail operations, they receive general supervision from the Alabama Department of Corrections. *See id.* at §§ 14-6-84, 14-6-85, 14-6-86, 14-6-90, and 14-6-98. In the area of law enforcement, sheriffs are not supervised on a day-to-day basis, but they can be directed to perform criminal investigations and make reports about those investigations to the governor, the state attorney general, or the district attorney. *Id.* at § 36-22-5.[6] Moreover, the governor is authorized to require sheriffs to provide "information in writing, under oath," concerning the conduct of their duties. Ala. Const. art. V, § 121.

The 1901 Constitution also specifies that sheriffs may be removed from office for misconduct only through an original impeachment action in the Alabama Supreme

---

[5] The primary trial court in the Alabama judicial system is the circuit court. There are forty judicial circuits, some of which are limited to one county while others encompass multiple counties. The presiding judge of each circuit exercises "general supervision" over the sheriff or sheriffs in the circuit. Ala. Code § 12-17-24. Other judges may also direct the activities of sheriffs with respect to particular matters. *Id.* at § 36-22-2(3).

[6] District attorneys, in turn, are state employees elected to perform prosecutorial functions for a given judicial circuit. Ala. Code § 12-17-180.

Court, generally initiated by the state attorney general at the request of the governor. Ala. Const. art. VII, § 174. This was a change from the former system, under which sheriffs were impeached at the local level. Ala. Const. art. VII, § 3 (1875).[7] The change was made in order to tighten central control over sheriffs, in response to the perception that "the neglect of sheriffs" had led to an "excessive number of lynching cases in Alabama." *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987). At that time, "the failure of county courts to punish sheriffs for neglect of duty and sheriffs' acquiescence in mob violence and ruthless vigilantism . . . led [the Governor] to believe that sheriffs must be held accountable to a higher and more central authority, the Supreme Court, and that this accountability would operate to guarantee the political rights of prisoners." *Id.* at 443-44; *see also id.* at 444. ("Sheriffs were made more accountable to the supreme executive power of the state, the Governor.").[8]

Alabama law gives county commissions *no* role in the development of policies governing local law enforcement or in the supervision of sheriffs in the performance of their law enforcement duties. *See Lockridge v. Etowah County Comm'n*, 460 So. 2d at 1363; *see also Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (noting that county

---

[7] A very similar provision, covering removal by county courts of various specified "county officers" and city officials, but *excluding* sheriffs, was retained in the 1901 Constitution. Ala. Const. art. VII, § 175.

[8] The 1901 Constitution also specified that it was an impeachable offense for a sheriff to make a false report to the Governor or to allow a prisoner in the county jail to be removed and killed or injured. Ala. Const. art. V, §§ 121, 138.

commissions have no authority to hire or fire deputy sheriffs); *King v. Colbert County*, 620 So. 2d 623, 625 (Ala. 1993) (holding that county commissions have no control over jail operations). They do, however, have statutory obligations to provide funds and facilities to be used by sheriffs. *See* Ala. Code § 11-14-10 (duty to maintain a jail); *id.* at § 36-22-16 (duty to pay a specified salary to sheriff); *id.* at § 36-22-18 (duty to furnish sheriff with necessary quarters, supplies, and automobiles). If a county appropriates an unreasonably small amount of money for these purposes, a sheriff can sue the commission in state court for relief. *See Geneva County Comm'n v. Tice*, 578 So. 2d 1070 (Ala. 1991); *Etowah County Comm'n v. Hayes*, 569 So. 2d 397 (Ala. 1990). Most, if not all, sheriffs also have access to funds outside of the county commission's control, like pistol permit funds. *See* Local Acts of Alabama, No. 96-630 (1996) (pertaining to Chambers County Sheriff), App. 1a; No. 87-481 (1987) (pertaining to Monroe County Sheriff), App. 1a-2a.

III. IMPOSING LIABILITY UPON CHAMBERS COUNTY, GIVEN THE COUNTY'S LACK OF LAW ENFORCEMENT AUTHORITY UNDER ALABAMA LAW, WOULD UNDERCUT THE BASIC FOUNDATIONS OF MUNICIPAL LIABILITY AS ARTICULATED IN *MONELL*.

Although the Eleventh Circuit in *McMillian*, 88 F.3d at 1577, noted arguments based on *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), nothing in the opinion indicates it based its holding on these arguments. Nonetheless, the Court should deny certiorari on the alternative basis that a holding in favor of Chambers County is

compelled by the reasoning of *Monell*. *Cf. Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (affirming the circuit court of appeals on a ground not relied upon by the circuit court). For the reasons stated below, the holding of this Court in *Monell* is extremely important to the question presented to the Court.

A. Petitioners' Argument Cannot Be Squared With the Primary Factor That Led This Court to Recognize Municipal Liability in *Monell* – the Status of Municipalities as Separate "Corporations" Under State Law.

In *Monell*, this Court held that municipalities were "persons" within the meaning of § 1983. The Court based its conclusion on the fact that municipalities are organized as "corporations" under state law and because the Dictionary Act and various Court decisions had determined that by 1871 corporations (including "municipal corporations") were generally treated as "persons" for purposes of statutory analysis. 436 U.S. at 687-89. This view of municipalities as separate public corporations is a consistent theme throughout the *Monell* opinion and throughout the legislative record analyzed in that opinion. *See, e.g.*, 436 U.S. at 668-69. It was this that led the Court to equate municipalities with the other "persons" who could be sued under § 1983 – i.e., individual public officials in their individual capacities. *See, e.g.*, 436 U.S. at 685-86; *see also* 436 U.S. at 682; *id.* at 707-08 (Powell, J., concurring).

However, accepting the petitioner's position – that Chambers County is liable for policies created by the

incumbent in an office that it did not create and cannot control – would require the Court to abandon this concept of municipalities as corporations. A "corporation" has a single governing board that controls its operations and either sets its "policies" or delegates that function to the officers. It is difficult to imagine how a single corporation could include both a governing board and a separate official vested with unchecked authority to set corporate policy. That reality is reflected in the suits against "municipalities," 436 U.S. at 690, suits against "[l]ocal governing bodies," *id.*, and suits against a local "government as an entity." *Id.* at 694. Certainly, the Sheriff of Chambers County is not a municipality, a local governing body or a local government, nor is he an agent thereof.

In essence, petitioners seek to have the Court adopt a radically different conception of "Chambers County" as a unit of *geography*, which can have "policies" that are set both by the County Commission (including those officials to whom the commission delegates authority) *and* by any other officials authorized by state law to operate in that geographic area. But it was not suits against units of geography but suits against "municipalities," defined as units of *government*, that the Supreme Court had in mind in *Monell*. *See* 436 U.S. at 694 ("[I]t is when the execution of a government's policy or custom . . . inflicts the injury that the *government* as an entity is responsible under § 1983.") (emphasis added). The only basis for treating municipalities as "persons" under § 1983 was the Supreme Court's understanding in *Monell* of cities and counties as corporate entities with a separate, coherent and cohesive structure and a single governing body. It

would make no sense to abandon that understanding and thereby expand municipal liability beyond anything that Congress could have had in mind.

B. Petitioners' Argument is Also Inconsistent With the Causation Requirement Recognized in *Monell*.

The tension between petitioners' position and *Monell* is even clearer in light of the Supreme Court's second holding – that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal *policy* of some nature *caused* a constitutional tort." 436 U.S. at 691 (emphasis added); *see also id.* at 694 (allowing municipal liability since the case "unquestionably involve[d] official policy as the *moving force* of the constitutional violation") (emphasis added). In every legal and practical sense, it is absurd to suggest that Chambers County as a municipal corporation (or the Chambers County Commission as its governing body) adopted or ratified a law enforcement policy that caused the alleged violations of petitioner's constitutional rights.

1. Origins of the Causation Requirement.

The causation requirement in *Monell* was derived, in part, from the language of § 1983, which creates a right of action against "any person who . . . shall subject or cause to be subjected" any other person to a deprivation of federal rights. As the Supreme Court recognized, this "language plainly imposes liability on a government that, under color of some official policy, 'causes' an employee

to violate another's constitutional rights," but it also "suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U.S. at 692; *see also Pembaur*, 475 U.S. at 478 (stating that "*Monell* is a case about responsibility.").

Even more important to the Court's conclusion was "the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur*, 475 U.S. at 479 (emphasis in original). This insight was derived from rejection in the House of Representatives of the "Sherman amendment," a proposed addition to the same act that contained § 1983, which, as noted above, would have imposed liability on municipalities whenever private citizens within their borders " 'riotously and tumultuously assembled . . . with intent to deprive' " another person of a federal right. *See Monell*, 436 U.S. at 666 (quoting the first conference version of the amendment); *see also Jett*, 491 U.S. at 726-27.

As the *Monell* Court exhaustively demonstrated, this proposal was defeated on the ground that many of "the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local government to create police forces," either directly or through imposition of liability for damages. 436 U.S. at 673; *see also id.* at 680 (quoting Rep. Burchard); Cong. Globe 794 (April 19, 1871) (Rep. Poland); *id.* at 791 (Rep. Willard); *id.* at 795 (Rep. Blair). The *Monell* Court noted that the legislative history

reveals "ample support for [Representative] Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly." 436 U.S. at 679. But, having reviewed this history, the Supreme Court in *Monell* concluded that Congress in 1871 did not create the same "Hobson's choice," because, instead of "imposing an obligation to keep the peace" that did not exist in state law, § 1983 applied only where "a municipality . . . was obligated by state law to keep the peace, but . . . had not in violation of the Fourteenth Amendment." *Id.*

2. Application of the Requirement to This Case.

The *Monell* causation requirement is implicated here in two ways. First, of course, there is a conflict between petitioner's position and the *Monell* Court's specific holding that § 1983 cannot be read to impose liability on municipalities for failure to enforce the law if state law does not grant them law enforcement powers. As the Eleventh Circuit in *McMillian* held, "Alabama law assigns law enforcement authority to sheriffs but not to counties." *McMillian v. Johnson*, Pet. App. at 8a (citing with approval *Swint v. City of Wadley, Ala.*, 5 F.3d 1436, 1450 (11th Cir. 1993)). The Chambers County Commission has no power to enact policies affecting law enforcement or to review those adopted by the sheriff. Yet petitioner contends that the County should face potential liability

under § 1983 based entirely on the law enforcement actions of Sheriff Morgan.

Indeed, under petitioner's theory, the County's only means of avoiding potential liability would be to violate state law and exceed its assigned authority by attempting to control the sheriff. This is precisely the outcome that Congress sought to avoid when it rejected the Sherman amendment on the ground that it would force municipalities to perform law enforcement functions not delegated to them by state law. Thus, here again, petitioner asks the Court to adopt a statutory interpretation that would undercut one of the central understandings expressed in *Monell* itself.

At a more general level, the Court held in *Monell* that a municipality may not be held liable "*solely* because it employs a tortfeasor – or, in other words, . . . on a *respondeat superior* theory." *Monell* 436, U.S. at 691 (emphasis in original). It concluded that Congress, having rejected one limited form of vicarious liability based on constitutional concerns in the Sherman amendment, could hardly have intended to authorize a broader form that "would have raised all the constitutional problems associated with the obligation to keep the peace." *Id.* at 693; *see also Jett*, 491 U.S. at 728-29. Petitioner's theory, however, would have the perverse effect of allowing a form of vicarious liability under § 1983 that is even more extreme than the *respondeat superior* theory rejected in *Monell*.

IV. LOGICALLY, IF A SHERIFF IS A *STATE* OFFICER FOR PURPOSES OF ELEVENTH AMENDMENT IMMUNITY, HE SHOULD NOT BE DEEMED A *COUNTY* POLICYMAKER.

Another alternative ground for denying the Petition is on the basis of the Eleventh Amendment. Before a governmental body can be held liable for the actions of a particular individual policymaker, obviously, the policymaker must be vested, by virtue of his office, with the authority to make policy. A policymaker, when setting policy for a governmental entity, necessarily acts in his "official capacity."

The Eleventh Circuit, in interpreting the Eleventh Amendment, has consistently found Alabama sheriffs (executive officers of the state) and their deputies, in their official capacities, to be representatives of the state and not the county. Consequently, suits against them in their official capacity are routinely dismissed based upon lack of jurisdiction. *See Dean v. Barber*, 951 F.2d 1210, 1215 n. 5 (11th Cir. 1992); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989); *Parker v. Williams*, 862 F.2d 1471, 1476 (11th Cir. 1989); *see also Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1527 (11th Cir. 1990) (holding that Eleventh Amendment immunity also extends to deputy sheriffs in Alabama). In the instant case, the district judge dismissed Sheriff Morgan in his official capacity based on his entitlement to Eleventh Amendment Immunity as an officer of the state of Alabama.

Swint does not challenge the ruling that Alabama sheriffs are state officers for the purpose of the Eleventh Amendment but contends that sheriffs are policymakers

for the county nonetheless. These theories are mutually exclusive. A single official cannot simultaneously be both a county policymaker and the equivalent of the state when sued in his official capacity. A sheriff in Alabama, therefore, is necessarily a policymaker for the state and not the county.

V. THE ELEVENTH CIRCUIT'S RELIANCE ON AN EXCEPTION TO THE "LAW OF THE CASE" DOCTRINE DOES NOT PRESENT AN ISSUE APPROPRIATE FOR CERTIORARI.

On pages 8 and 11 of the petition, Swint contends that this Court should also grant a writ of certiorari to review the Eleventh Circuit's ruling with respect to the "law of the case" issue. However, the holding of the Eleventh Circuit on this question does not present an issue appropriate for this Court's review because the Eleventh Circuit's holding does not conflict with any holding of this Court, there is no conflict among the circuits, and no important federal question is raised.

This Court has rarely discussed the "law of the case" doctrine. Where the doctrine is discussed, the Court has described it as "an amorphous concept" which does not limit the power of the court; it serves only to direct the court's discretion. *Arizona v. California*, 460 U.S. 605, 618 (1983) (refusing to apply the "law of the case" doctrine in the context of original jurisdiction). This Court has also recognized exceptions to the doctrine's application where there are "changed circumstances or unforeseen issues not previously litigated." *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992). In *Arizona*, the court emphasized that it

retained the power to reopen a ruling if it thought a prior judgment had been in error. *Id.*

Nothing in the Eleventh Circuit's "law of the case" jurisprudence or application of the doctrine in the instant case is in conflict with this Court's general view of the doctrine. The Eleventh Circuit recognizes the "law of the case" rule but allows an exception to the rule "where new and substantially different evidence material to the issue has been presented after the appellate decision." Pet. App. 5. Nothing about this exception is contrary to this Court's interpretation of the doctrine. *See Wyoming*, 502 U.S. at 446 (recognizing "changed circumstances or unforeseen issues" as an exception to the doctrine but noting that Oklahoma had only "recited the same facts").

After setting out the doctrine and its exceptions, the Eleventh Circuit went on to find, as the district court had found after reviewing the record, that Respondent Morgan had presented substantially different evidence on the second motion for summary judgment than had been presented on the first motion for summary judgment. Pet. App. 6. The question of whether the district court properly viewed the record to contain substantially different information simply does not create a legal issue important enough to justify the granting of certiorari; in fact, the issue is really much more factual than legal in nature.

Additionally, as this Court noted in *Arizona*, the "law of the case" doctrine is more discretionary than mandatory. The instant case well illustrates why discretion is best employed to allow Morgan to present the new affidavit. If the lower courts do not allow him to do so, the parties will be forced to try this case at which time Sheriff

Morgan would take the stand, testify consistently with his new affidavit, the Petitioners would be unable to rebut his testimony just as they are at summary judgment stage, and the district court would then be required to grant a motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Applying an exception to the "law of the case" doctrine here prevents that waste of time and resources.

Finally, both the district court and the Eleventh Circuit were clearly correct in their finding that Sheriff Morgan presented substantially new information upon his second summary judgment motion. On the first interlocutory appeal, the Eleventh Circuit surmised, by negative inference, that Morgan must have known the details about alleged constitutional violations occurring in the first "raid" before he authorized the second one. However, the record was silent on that point. The record showed only that he had been told that an undercover "buy" had been made and several individuals had been arrested. On the second motion for summary judgment, Sheriff Morgan fills the "void" in the record by testifying that information about a drug "buy" and an accompanying arrest represented *all* he knew about what occurred at the first "raid". Because the Eleventh Circuit was so keenly focused on this knowledge, Morgan's new affidavit presented substantially new information.[9]

---

[9] Petitioners assert that this information could have been brought out upon the first motion for summary judgment. However, this assertion is based on hindsight. Respondents entered evidence into the record about what Morgan had been told; however, the need to enter evidence about what Morgan

CONCLUSION

Based upon the foregoing, Respondents Chambers County Commission and James C. Morgan respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

* KENDRICK E. WEBB
BART HARMON
WEBB & ELEY
166 Commerce Street, Suite 300
Post Office Box 238
Montgomery, Alabama
36101-0238
(334) 262-1850
Counsel for Respondent
* *Counsel of Record*

---

had *not* been told simply was not apparent until the issues had been fleshed out in the district court's order and the Eleventh Circuit's original order.

Act No. 96-630 **H. 942 – Reps. Laird, Fuller**

***Be It Enacted by the Legislature of Alabama*:**

Section 1. Section 2 of Act No. 1180 H. 2226, 1971 Regular Session, as amended, is amended to read as follows:

"Section 2. The amount of each fee collected shall be credited to a special fund or account in the Chambers County treasury and shall be used by the sheriff exclusively for law enforcement purposes. The sheriff shall have exclusive control and responsibility for the fund created by this section."

Section 2. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This Act became a law under Section 125 of the Constitution on May 21, 1996 without approval by the Governor.

Act No. 87-481 **H. 996 – Rep. Warren**

***Be It Enacted by the Legislature of Alabama*:**

Section 1. In Monroe County the fee for issuance of a permit to carry a pistol in a vehicle or concealed on or about the person as provided in Title 13A-11-75, Code of Alabama 1975, shall be $10.00, which shall be collected by the sheriff.

Section 2. Any and all monies collected under section 1 of this act shall be deposited by the sheriff of Monroe County in any bank located in Monroe County

selected by the sheriff, into a fund known as the Sheriff's Law Enforcement Fund.

Section 3. The Sheriff's Law Enforcement Fund as provided in section 2 of this act shall be drawn upon by the sheriff of Monroe County or his appointed agent and shall be exclusively for law enforcement purposes in the public's interest and in the discharge of the sheriff's office as the sheriff sees fit.

Section 4. The establishment of the Sheriff's Law Enforcement Fund as provided in this act and the use of such funds shall in no way diminish or take the place of any other imbursement or other source of income established for the sheriff or the operation of his office.

Section 5. All laws or parts of laws which conflict with this act are hereby repealed.

Section 6. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 7. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved July 22, 1987

Time: 8:44 A.M.